Supreme Court, U.S.
FILED

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Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH P. MONAHAN, II
Petitioner,

v.

DVI FINANCIAL SERVICES, INC.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

PETITION FOR WRIT OF CERTIORARI

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10 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals Seventh Circuit properly declined to invoke the "Doctrine of Unique Circumstances" exception to the general rule of jurisdiction that an untimely appeal divests the Court of jurisdiction to hear an appeal?

PARTIES

Joseph Monahan is an individual pro se petitioner. The names of all parties to the proceedings appear in the caption of this case.

TABLE OF CONTENTS

CITATIONS OF OPINIONS.....1

STATEMENT OF JURISDICTION.....1

STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

REASON WHY THIS PETITION SHOULD BE GRANTED.....4

I. REVIEW IS NEEDED TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO THE APPLICABILITY OF THE DOCTRINE OF UNIQUE CIRCUMSTANCES

A. The decision of the Seventh Circuit conflicts squarely with decisions of the Eleventh Circuit and the Supreme Court.

APPENDIX.

TABLE OF AUTHORITIES

Sonicraft v. NLRB, 814 F.2d 385, 387 (7th Cir. 1987).....3

In Re Provan, 74 B.R. 717, 719 (9th Cir.1986).....5

Thompson v. I.N.S., 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964).....5

In Willis v. Newsome, 747 F.2d 605, 606 (11th Cir.1984).....5

Thompson v. Immigration and Naturalization Service, 375 U.S. 384, 386-87, 84 S.Ct. 97, 398-99, 11 L.Ed.2d 404 (1967).....5

Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217, 83 S.Ct. 283, 285, 9 L.Ed.2d 261 (1962).....5

Aviation Enterprises, Inc. v. Orr, 716 F.2d 1403, 1406 n. 25 (D.C.Cir.1983).....5

Needham v. White Laboratories, Inc., 639 F.2d 394, 398 (7th Cir.).....5

Willis v. Newsome, 747 F.2d 605, 606 (11th Cir.1984).....6

Galt v. Jericho-Britton (In re Nucorp Energy, Inc.), 812 F.2d 582, 584 (9th Cir.1987).....6

In re Provan, 74 B.R. 717, 720 (Bankr. 9th Cir.1987), aff'd, 862 F.2d 318 (9th Cir.1988).....6

Sonicraft v. NLRB, 814 F.2d 385, 387 (7th Cir.1987).....8

Spinetti v. Atlantic Richfield Co., 552 F.2d 927, 930 (Temp.Emer.Ct.App.1976).....8

In re Provan, 74 B.R. at 720-21.....8

Willis v. Newsome, 747 F.2d at 606.....8

Willis, 747 F.2d at 606-07.....9

Des Isles v. Evans, 225 F.2d 235, 236 (5th Cir.1955).....9

Statutes and Rules:

11 U.S.C. § 523(a)(2)(A).....6

11 U.S.C. § 523(a)(2)(B).....6

Bankruptcy Rule 8002(a).....8

CITATIONS OF OPINIONS

The February 20, 2001, decision of the United States Court of Appeals for the Seventh Circuit is reported as Joseph P. Monahan, II v. DVI Financial Services, Inc. (Appendix App. 2)

The July 31, 2000, decision of the United State District Court Northern District of Illinois granting Motion to Dismiss for Lack of Jurisdiction. (Appendix App. 7)

The final judgment order of the United States Bankruptcy Court dated May 1, 2000, docketed in this adversary proceeding on May 3, 2000 finding in favor of the Plaintiff DVI Financial Services. (Appendix App. 9)

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment in this case on February 20, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The "Doctrine of Unique Circumstances" which permits an otherwise untimely appeal to be considered jurisdictionally valid under certain limited circumstances. See Thompson v.

Immigration and Naturalization Service, 375 U.S. 384, 386-87, 84 S.Ct. 397, 398-99, 11 L.Ed.2d 404 (1967); Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217, 83 S.Ct. 283, 285, 9 L.Ed.2d 261 (1962); Aviation Enterprises, Inc. v. Orr, 716 F.2d 1403, 1406 n. 25 (D.C.Cir.1983); Needham v. White Laboratories, Inc., 639 F.2d 394, 398 (7th Cir.)

Bankruptcy Rule 8002(a) which requires that a notice of appeal from a bankruptcy court's decision be filed within ten (10) days from the entry of judgment, and failure to do so deprives the District Court of jurisdiction.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On February 20, 2001 the United States Court of Appeals for the Seventh Circuit affirmed the United States District courts ruling dismissing Joseph Monahan appeal for reasons of lack of jurisdiction per Bankruptcy Rule 8002(a) which requires that a notice of appeal from a bankruptcy court's decision be filed within ten (10) days from the entry of judgment, and failure to do so deprives the district court of jurisdiction. The United States Court of Appeals for the Seventh Circuit held that the Doctrine of Unique Circumstances does not apply when an employee of the court misleads or

inaccurately advises a party regarding the timeliness of an appeal. See Sonicraft, 814 F. 2d at 387.

This is an appeal action to the United States District Court from the United States Bankruptcy Court by debtor-appellant Joseph P. Monahan, against plaintiff-appellee DVI Financial Services, Inc. (DVI) On July 31, 2000 the District Court strikes it's ruling of July 13, 2000 denying plaintiff-appellee's DVI motion to dismiss for lack of jurisdiction. Upon further consideration, the District Court grants the motion to dismiss for lack of jurisdiction, terminating this case.

Additional background is as follows. On January 25, 1999, Joseph Monahan filed a bankruptcy petition to discharge his debts including the debt to DVI Financial Services. On April 30, 1999, DVI Financial Services filed an adversary complaint. On April 17 and 18, 2000 a trial was held before Honorable John H. Squires, United States Bankruptcy Court, to determine if the debt owed by Joseph P. Monahan II (Defendant-Appellant) to DVI Financial Services, Inc. (Plaintiff-Appellee) in the amount of $438,894.72 was dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(2)(B). The final judgment order of the bankruptcy court dated May 1, 2000, was docketed in this adversary proceeding on May 3, 2000 finding in favor of the Plaintiff DVI Financial Services declaring this debt nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). The debt in this matter is the result of a breach of contract action filed by plaintiff-appellee

DVI Financial Services, Inc. ("DVI") against defendant-appellant Joseph Monahan ("Monahan") on February 19, 1997. At that time, the District Court granted DVI's motion for summary judgment in open court on October 24, 1997, which order was entered by the Clerk on October 28, 1997. The district court entered final judgment against Monahan in the amount of $438,894.72 on March 31, 1998.

REASON WHY THIS PETITION SHOULD BE GRANTED

II. REVIEW IS NEEDED TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO THE APPLICABILITY OF THE DOCTRINE OF UNIQUE CIRCUMSTANCES

A. The decision of the Seventh Circuit conflicts squarely with decisions of the Eleventh Circuit and the Supreme Court.

The United States Court of Appeals for the Seventh Circuit in it's order clearly states that it is in conflict with opinions of the Eleventh Circuit. Additionally the Seventh Circuit conflict with other

Circuits and the Supreme Court with respect to the "Doctrine of Unique Circumstances"

Where a Notice of Appeal is not filed on time, there is jurisdiction to consider appellant's arguments as to why the appeal should nevertheless be allowed to proceed. In Re Provan, 74 B.R. 717, 719 (9th Cir.1986). The Supreme Court has held that where an appellant can establish the existence of "unique circumstances" an otherwise untimely appeal can proceed. Thompson v. I.N.S., 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964). In Willis v. Newsome, 747 F.2d 605, 606 (11th Cir.1984). The doctrine of unique circumstances permits an otherwise untimely appeal to be considered jurisdictionally valid under certain limited circumstances. See Thompson v. Immigration and Naturalization Service, 375 U.S. 384, 386-87, 84 S.Ct. 397, 398-99, 11 L.Ed.2d 404 (1967); Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217, 83 S.Ct. 283, 285, 9 L.Ed.2d 261 (1962); Aviation Enterprises, Inc. v. Orr, 716 F.2d 1403, 1406 n. 25 (D.C.Cir.1983); Needham v. White Laboratories, Inc., 639 F.2d 394, 398 (7th Cir.)

Courts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

Willis v. Newsome, 747 F.2d 605, 606 (11th Cir.1984) Because the time limit for filing a notice of appeal is jurisdictional and strictly enforced, see Galt v. Jericho-Britton (In re Nucorp Energy, Inc.), 812 F.2d 582, 584 (9th Cir.1987), the doctrine of unique circumstances is narrowly applied, see In re Provan, 74 B.R. 717, 720 (Bankr. 9th Cir.1987), aff'd, 862 F.2d 318 (9th Cir.1988).

Petitioner Joseph Monahan argued that the erroneous advice of the court clerk and the confusing United States Bankruptcy Court Local Rules led him to believe that his Pro Se Notice of Appeal was filed in a timely fashion.

On April 17 and 18, 2000 a trial was held before Honorable John H. Squires to determine if the debt owed by Joseph P. Monahan II (Defendant-Appellant) to DVI Financial Services, Inc. (Plaintiff-Appellee) in the amount of $438,894.72 was dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(2)(B).

The Clerk of the United States Bankruptcy Court has failed to send notice of entry of bankruptcy court order to Appellant Joseph P. Monahan II.

On May 8, 2000, Joseph Monahan went to the Dirksen Federal Building at 219 South Dearborn Street, Chicago, Illinois to find out if the final bankruptcy court order was entered and docketed.

On May 8, 2000, at the Dirksen Federal Building, Joseph Monahan found out that the final judgment order of the bankruptcy court dated May 1, 2000, was docketed in this adversary proceeding

on May 3, 2000 finding in favor of the Plaintiff DVI Financial Services declaring this debt nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

On May 8, 2000 at the Dirksen Federal Building on the 7th floor, Joseph Monahan received from the clerk of the United States Bankruptcy Court a document which contains the **United States Bankruptcy Court Local Rules.**

On page iii of the United States Bankruptcy Court Local Rules contains a section "Rules 1400-1499 Appeals and Withdrawals of Reference". In section 1400-1499 there are not any rules pertaining to appeals. The copy provided by the clerk looks incomplete.

Joseph Monahan inquired to the United States Bankruptcy Clerk's office on May 8, 2000 to determine if this section was incomplete. The clerk of the United States Bankruptcy Court was unsure and directed Joseph Monahan to inquire to the clerk of the United States District Court.

On May 8, 2000 at the Dirksen Federal Building on the 20th floor, a clerk of the United States District Court told Joseph Monahan that he had 30 days to file his notice of appeal.

Joseph Monahan filed his notice of appeal on May 23, 2000.

United States Bankruptcy Court Local Rules document and the clerk lead Joseph Monahan into believing there are local rules for appeals beyond Bankruptcy Rule 8002(a).

Joseph Monahan reasonably and in good faith relied upon the information that indicated to Joseph Monahan that his assertion of his right to appeal would be timely. Otherwise Joseph Monahan would have taken proper action to file the notice of appeal within the 10-day period per Bankruptcy Rule 8002(a). On May 8, 2000 Joseph Monahan found out that the final judgment order of the Bankruptcy Court dated May 1, 2000 and docketed in this adversary proceeding on May 3, 2000. On May 8, 2000, Joseph Monahan was still well within the 10-day filing period per Bankruptcy Rule 8002(a).

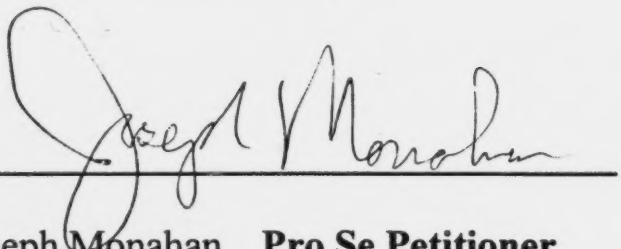
Reliance on the statements, action, or inaction by the clerk of the court normally will not justify application of the doctrine of unique circumstances. See, e.g., Sonicraft v. NLRB, 814 F.2d 385, 387 (7th Cir.1987) (misleading advice of the clerk cannot extend jurisdictional deadline for filing petition for review); Spinetti v. Atlantic Richfield Co., 552 F.2d 927, 930 (Temp.Emer.Ct.App.1976) ("attorneys may not escape from their procedural errors by claiming reliance on a district court clerk's advice"); In re Provan, 74 B.R. at 720-21 (attorney's reliance on clerk's acceptance of designation of record, even though notice of appeal never received, insufficient to invoke doctrine). In the few cases in which the doctrine has been applied, the misleading action of the clerk has related to the time period for filing the notice of appeal, not its legal effect. Cf. Willis v. Newsome, 747 F.2d at 606. The case at bar did presented "unique circumstances". This cases involved reliance by the appellant on either an

affirmative act or statement by the trial court clerk's office. See Willis, 747 F.2d at 606-07. Petitioner Joseph Monahan argued this exact point that the cases applying this doctrine are therefore distinguishable, in that they involve a party's reliance on court action in determining the timeliness of notice of appeal. The Rules of Appellate Procedure "were not adopted to set traps and pitfalls by way of technicalities for unwary litigants." Des Isles v. Evans, 225 F.2d 235, 236 (5th Cir.1955)

The ruling of the United States Court of Appeals for the Seventh Circuit is in conflict with opinions of the Eleventh Circuit, other Circuits and the Supreme Court.

For the foregoing reasons, Petitioner Joseph Monahan requests that the Court grant this petition for a Writ of Certiorari in order to rectify and clarify the conflict among the Circuits with respect to the application of the Doctrine of Unique Circumstances. Congress enacted the "Doctrine of Unique Circumstances" so that Appellants would be treated fairly if they acted in good faith with respect to the rules of appellate procedure. In no way can we conclude that an Appellant should be denied their access to the Courts due to erroneous information from Court employees who are just trying to be helpful.

Respectfully Submitted,



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APPENDIX

Appendix App. 2. February 20, 2001, decision of the United States Court of Appeals for the Seventh Circuit

Appendix App. 7. July 31, 2000, decision of the United State District Court Northern District of Illinois

Appendix App. 9. Final judgment order of the United States Bankruptcy Court dated May 1, 2000

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 31, 2001
Decided February 20, 2001

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 00-3253

IN RE: JOSEPH P. MONAHAN
Debtor-Appellant

JOSEPH P. MONAHAN
Defendant-Appellant

v. No. 00 C 3976

DVI FINANCIAL SERVICES, INC.
Plantiff-Appellee

George W. Lindberg
Judge

ORDER

After Joseph Monahan failed to file a timely notice of appeal from a bankruptcy court decision, the district court dismissed his appeal for lack of jurisdiction. Monahan, proceeding pro se, now argues that his untimely appeal should have been allowed to go forward because he was given erroneous advice by a district court clerk about the deadline for appealing a bankruptcy decision. We affirm.

On May 3, 2000, following a two-day bench trial, a bankruptcy court entered a judgment in favor of DVI Financial Services on its adversary complaint against Monahan, ruling that Monahan's debt to DVI was not dischargeable in bankruptcy because the debt was obtained by false pretenses, false representation, or actual fraud, 11 U.S.C. § 523(a)(2)(A). Monahan claims that he never received notice of the bankruptcy court's judgment. When he heard nothing, Monahan relates, he personally went to the bankruptcy court on May 8 to determine whether any judgment had been entered and, if so, by when did he have to file a notice of appeal. At the bankruptcy court clerk's office, Monahan learned that on May 3 a judgment had in fact been entered against him. Monahan asserts that he then requested a copy of the local bankruptcy rules from a bankruptcy court clerk. He says that he briefly reviewed the rules at the bankruptcy clerk's office, but was confused and thought the rules might

be incomplete. Monahan asked the bankruptcy court clerk a question about the section of the rules discussing appeals; the bankruptcy clerk, Monahan recalls, directed him to inquire at the district court clerk's office. At the district court clerk's office, Monahan says that a clerk informed him that he had thirty days to file a notice of appeal. Monahan apparently never examined the language of the rules themselves. Monahan then filed a notice of appeal with the bankruptcy court on May 23, 2000. Because more than ten days had lapsed after the bankruptcy court entered its judgment, see Bankr. R. 8002(a), the district court dismissed Monahan's untimely appeal for lack of jurisdiction and denied his subsequent motion for reconsideration. Monahan now appeals.

Bankruptcy Rule 8002(a) requires that a notice of appeal fro a bankruptcy court's decision be filed within ten days from the entry of judgment, and failure to do so deprives the district court of jurisdiction. See, e.g., In the Matter of Maurice, 69 F.3d 830, 832 (7th Cir. 1995); In re Longarder & Assoc., Inc., 855 F.2d 455, 464 (7th Cir. 1988); Stepflug v. Federal Land Bank of St. Paul, 790 F.2d 47, 49 (7th Cir. 1987). Monahan admits that his notice of appeal from the bankruptcy court's judgment was not timely filed, but argues that the so-called doctrine of "unique circumstances" gives the court jurisdiction over his appeal. This doctrine creates a limited exception to the jurisdictional bar against untimely appeals by treating some steps in

the appellate process as if they had been done on time. See Osterneck v. Ernst & Whinney, 489 U.S. 169, 178-79 (1989); Thompson v. INS, 375 U.S. 384, 387 (1964) (per curiam); United States v. Hirsch, 207 F.3d 928, 930 (7th Cir 2000). In Osterneck, the Supreme Court stated that the doctrine will excuse an untimely notice of appeal "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurances by a judicial officer that this act has been properly done." Osterneeck, 489 U.S. at 179.

This court has explicitly held that the doctrine of unique circumstances does not apply when a subordinate employee of the court misleads or inaccurately advises a party regarding the timeliness of an appeal. See Sonicraft, 814 F.2d at 387. In Sonicraft, a staff attorney allegedly misinformed counsel that a petition to review the National Labor Relations Board's denial of attorneys fees would be timely if mailed (as opposed to received) within thirty days. Id. At 386. We noted that the deadline was jurisdictional and further held that "subordinate employees of the judiciary have no authority to waive congressional limitation on judicial power." Id. At 387.

Other circuits, two of them relying in part on Sonicraft, have also held that the unique circumstances exception is inapplicable when a party receives erroneous advices from a clerk's

office. See, e.g. Rezzonico v. H & R Block, Inc. 182 F.3d 144, 152 (2nd Cir. 1999) (citing Sonicraft) (district court clerk's office provided erroneous information regarding the deadline for filing an appeal); Moore v. South Carolina Labor Bd., 100 F.3d 162, 164 (D.C. Cir. 1996) (per curiam) (clerk erroneously informed pro se litigant that he had 60 days to file a notice of appeal – instead of 30 – because the government was a party); United States v. Heller, 957 F.2d 26, 30-31 (1st Cir. 1992) (citing Sonicraft) (clerk erroneously informed litigant that he had 60, rather than 30, days to file a notice of appeal); see also Neeley v. Murchison, 815 F.2d 345, 347 (5th Cir. 1987).

Monahan recognizes this precedent but urges us to disregard it. He relies instead on a decision from the Eleventh Circuit, see Willis v. Newsome, 747 F.2d 605 (11th Cir. 1984) (per curiam). Willis is not law of this circuit and, in any event is distinguishable. In Willis, the court permitted the appellant to maintain an otherwise untimely appeal where he relied on a clerk's representation regarding the "local custom" in the clerk's office of stamping notices of appeal. See Willis, 747 F.2d at 606. No such "local custom" is at issue in this case. The erroneous advice Monahan claims to have received from the district court clerk involves the substance of Bankruptcy Rule 8002(a) – the amount of time allotted to file a notice of appeal. Monahan's facts thus parallel Sonicraft more closely than Willis.

AFFIRMED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

District Court Case No. 00 C 3976
Honorable George W. Lindberg

Appeal from Bankruptcy No. 99 B 02199
Adversary No. 99 A 00603

JOSEPH P. MONAHAN

Defendant-Appellant
v.

DVI FINANCIAL SERVICES, INC.

Plaintiff-Appellee

Minute order

ORDER

The court strikes its ruling denying appellee's motion to dismiss. Upon further consideration, the court grants the motion to dismiss for lack of jurisdiction. It declines to follow the holding in Carter v. Carter, 1996 WL 374127 (N.D. Ill.), upon which appellant relies and upon which this court based its previous ruling denying the motion to dismiss. The court finds that under Sonicraft v. Natl. Labor Relations Bd., 814 F.2d 385 (7th Cir. 1987), the appellant cannot rely on information

received from a clerk's office employee regarding time to appeal to establish the "unique circumstances" that would permit an otherwise untimely appeal to proceed. As the Seventh Circuit observed in Sonicraft, "(s)ubordinate employees of the judiciary have no authority to waive congressional limitations on judicial power." Id. At 386. " Failure to timely file a notice within the ten day appeal period divests the district court jurisdiction over the appeal and mandates dismissal of the appeal." Martin v. Bay States Milling Co., 151 B.R. 154, 155 (N.D. Ill. 1993) (citing In re Peacock, 125 B.R. 526, 528 n. 7 (N.D. Ill., 1991) ("(t)he 10-day time period in which to file a bankruptcy appeal is jurisdictional under Bankruptcy Rule 8002(a)"). Because "the deadline for filing is jurisdictional... we have no power to waive it." Sonicraft, 814 F.2d at 386. For that reason, the court must dismiss this action for lack of jurisdiction.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 B 02199
Chapter 7 Bankruptcy
Judge John H. Squires

Adversary No. 99 A 00603

IN RE:
JOSEPH P. MONAHAN, II,
Debtor.

DVI FINANCIAL SERVICES, INC.

Plaintiff-Appellee,

JOSEPH P. MONAHAN, II,

Defendant-Appellant.

ORDER

THIS MATTER COMING for trial before Honorable John H. Squires on April 17 and 18, 2000, the Court having reviewed the parties' pretrial submissions, the testimony of Robert J. Bauersmith and Joseph P. Monahan, II, and the exhibits

admitted into evidence, as well as the arguments of the parties, in consideration of the foregoing and for the reasons stated in open court on April 18, 2000, it is the judgment of this Court that:

1. the debt by Joseph P. Monahan, II ("Monahan") to DVI Financial Services, Inc. ("DVI"), in the amount of $438,894.72, exclusive of interest (the "debt"), is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A); and
2. with respect to DVI's request that the debt also be declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B), the Court finds in favor of the debtor.

/s/ John H. Squires
Date: 5/1//00